IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARY BETH HARSHBARGER,	)	
	)	
Plaintiff	)	
	)	
	)	
vs	)	09cv487
	)	
	)	
MICHAEL REGAN, et.al.,	)	
	)	
Defendants	)	

BEFORE: HONORABLE THOMAS I. VANASKIE
United States District Judge
for the Middle District of Pennsylvania

Hearing Re: Habeas Corpus Petition

Wednesday, March 25, 2009
Scranton, Pennsylvania

A P P E A R A N C E S:

For The Plaintiff: PAUL P. ACKOUREY, ESQ.
Law Offices of Paul P. Ackourey
116 N. Washington Avenue
Suite 1-G
Scranton, Pennsylvania 18503

For The Defendants: CHRISTIAN A. FISANICK, ESQ.
U.S. Attorney's Office
235 N. Washington Avenue
Scranton, Pennsylvania 18503

KRISTIN L. YEAGER, RMR,CRR - COMPUTER TRANSCRIPT

MR. FISANICK: Good morning, Your Honor.

MR. ACKOUREY: Good morning.

THE COURT: Good morning. All right, we are here for oral argument on the Habeas Corpus Petition filed by Mrs. Harshbarger, in connection with the decision by Magistrate Judge Mannion that she was subject to extradition to Canada, and I'll hear from counsel for Mrs. Harshbarger.

MR. ACKOUREY: Thank you, Your Honor. Your Honor, may I remain seated?

THE COURT: If you prefer, that's fine.

MR. ACKOUREY: Thank you, Judge. Judge, any analysis of this matter regarding extradition begins with Section 3184 of Title 18. And here, Judge, Congress indicates that the issue of whether evidence is sufficient to sustain the charge under the provisions of a treaty really rests with an analysis of the treaty or convention. The Act specifically states that;

"Certification will occur, if the Judicial Officer finds the evidence sufficient to sustain the charge under the provisions of the treaty."

So that takes us to the treaty between the United States and Canada.

THE COURT: What about 18 United States Code Section 3190? Evidence on here says;

"Depositions, warrants or other papers or copies thereof often evidence upon hearing of any extradition case shall be

received and admitted as evidence on such hearing for all the purposes of such hearing, if they shall be properly and legally authenticated."

MR. ACKOUREY: Yes, Your Honor. I have no problem with the admissibility of the documents that the Government has submitted, and that has not been challenged in the Habeas proceeding. I believe those documents are admissible, provided they comply with the terms of the statute, and I think they have.

THE COURT: All right.

MR. ACKOUREY: However, the issue really is what constitutes sufficient evidence, having admitted those? Is it sufficient evidence as required under the treaty? The Government and Magistrate Judge Mannion had cited a string citation of a series of cases, Federal cases, authorizing the use of hearsay alone to establish sufficient evidence justifying extradition.

I don't believe those cases shed light on the problems that we face with this particular case, in that --

THE COURT: Well, let me ask this question, counsel. Do you agree that the information in the affidavits that have been presented are sufficient -- forget about their competency -- but the information itself, if I found that to be competent information, that is, information I can rely on, would establish probable cause to find that Mrs. Harshbarger has committed the crimes for which she has been accused of in

Canada?

MR. ACKOUREY: I don't, Judge. And one of the problems I have, and it comes right out of Judge Mannion's opinion itself, he goes through eight factors that he relies on from the affidavits to establish probable cause. And then in the next breath, he indicates that, reading the affidavits, and if you could construe the affidavits fairly, present evidence that would suggest that the mens rea element hasn't been reached, that, in fact, this is nothing more than negligence, tortious negligence, if that, and I think that's the language he used as a matter of fact, with regard to his initial opinion, supporting the issuance of a summons as opposed to a warrant.

It's important to note, Judge, there was no additional information provided to Judge Mannion from the initial filing of the complaint and affidavits through the extradition hearing itself. And in the initial opinion supporting the summons, he says;

"Looking at these affidavits, I'm not even sure there's negligence here, let alone gross negligence, as required."

Using the same evidence in his opinion certifying extradition, he cites eight factors that he relies on to find probable cause, but then, in the next breath, says;

"A fair reading of the affidavits present facts which could reasonably be interpreted to establish that there was no gross negligence here."

He then goes on to say;

"But, of course, this is not a hearing beyond a reasonable doubt standard, we are just asking probable cause."

But the problem that I have, Judge, is that when he talked about probable cause, and it has been defined in different ways by different courts, one of the definitions that we come across is that there has to be some evidence that a crime was committed and that it was reasonable to believe that the Defendant committed it. Well, if you have evidence, when you look at it, that could go either way.

I would submit, Judge, that the Government hasn't met its burden, at least, in establishing that the evidence tends to establish a crime committed and that the Defendant is the person that committed that crime.

THE COURT: Well, the evidence included re-enactments of the occurrence.

MR. ACKOUREY: Yes.

THE COURT: And the investigating officers, on two separate occasions, and I think it's two separate officers, concluded that a shot should not have been taken, that it was not reasonable to fire a shot under the lighting conditions that existed at that time.

MR. ACKOUREY: Well, what they concluded, Judge, is that, based upon their re-enactments on two occasions, that it was plausible that what Mary Beth Harshbarger thought she saw was a

bear, so they come to that conclusion. They come to the conclusion that it was too dark to shoot. However, the affidavits also indicate -- or at least the evidence that was before Judge Mannion in the case -- that the shot that was fired was fired at 7:55 within the legal hunting day.

THE COURT: That's not negligence per se.

MR. ACKOUREY: That's correct. And as a matter of fact, Judge, it could be submitted, I think, that the fact that one could fire a shot up to a half hour after sunset would, in fact, suggest that somewhere in Canada, someone had made a determination that there was sufficient light to fire a shot under those circumstances. There's no other -- and it's interesting to note -- nothing in the affidavits, which would suggest that there were any other factors that may have inhibited visibility, like, fog or rain or anything of that nature.

THE COURT: Well, there was four to five-foot high grass.

MR. ACKOUREY: And that's interesting, too, Judge, because the affidavits say at the Jeep or at the vehicle, the grass is about knee-high.

THE COURT: Looks like it's about knee-high.

MR. ACKOUREY: I'm sorry, where Mary Beth was located, at the time that she fired the shot, it appeared to be knee-high. Where the decedent is found, it's shoulder height, which would suggest, of course, from the shooter's perspective, that the

item or individual or the thing that she's shooting at is not a six-foot tall male but rather something smaller, hunched over, dark clothes, a bear, I mean, that's obviously what she thought she was firing at.

The question is, I think, is are those actions, do they rise to gross negligence? Is it a gross deviation from the standard of care that a reasonable person would have exercised under similar circumstances? She's there with a hunting guide, she has a scope on the rifle. Again, the shot is fired within the permissible time for hunting.

I would submit, Judge, that other factors outside of Mary Beth's control certainly played a larger role than anything Mary Beth did. In particular, the topography that existed at the time, the fact that it was extremely foggy, and that the decedent's gait was altered, the dark clothes, he was hunched over, looking down, as he's walking through the -- out of the woods, probably played more of a role in this tragedy than anything Mary Beth, herself, had done.

Really the question is, Is it a gross deviation from the standard of care? Is there a showing of that? When the Magistrate Judge indicates that a fair reading of the affidavits could suggest, not even negligence here or, at most, tortious negligence, I would submit, then, that the Government's evidence, and it's uncontested evidence, we are looking at their affidavits, is insufficient if one can draw

different conclusions from the same facts.

THE COURT: Why do you say that? I mean, the standard is whether the evidence is such to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt. So if they can conscientiously entertain a reasonable belief of the accused's guilt, isn't that enough? They can draw either of two conclusions.

MR. ACKOUREY: I would argue, Judge, that I think what that means is that a reasonable person looking at the facts in the totality would come to the conclusion that it is more likely than not that a crime was committed and that she's the perpetrator. And when the Magistrate Judge says, Jeez, a fair reading of this, you could see it the other way, I would suggest, Judge, then, it's not enough. If the evidence is such that one can say it is or it isn't, then, does that meet the threshold?

Judge, in looking at this case and in determining what law applies and determining the sufficiency of the evidence, both the Government and Magistrate Judge Mannion suggest that the Sylvester case and the analysis used in the Sylvester case was based upon an application of Pennsylvania law arising out of the Dual Criminality Doctrine.

THE COURT: Right.

MR. ACKOUREY: A fair reading of the Judge's opinion, Judge Jones' opinion in Sylvester, indicates that his analysis is an

Article 10 analysis. And I've had an opportunity to read the briefs that were submitted with regard to Sylvester, and would represent to the Court that no one was arguing Pennsylvania law applies, due to dual criminality, they were arguing Article 10, applicability of Article 10 and what does Article 10 mean in the statute -- in the treaty.

THE COURT: Has any other Federal Court, besides Judge Jones in the Sylvester case, held that hearsay cannot be relied on, in finding probable cause in an extradition proceeding?

MR. ACKOUREY: Judge, not that I'm aware of. However, I think, again, if we take a look at 3184, we are told to go to the language of the treaty itself, the fact that we are dealing with a Canadian statute, Article 10 provision, and in Pennsylvania, makes this case somewhat unique and made Sylvester unique.

THE COURT: If this was a shooting that occurred in the Delaware Water Gap on Federal property and Mrs. Harshbarger was charged with commission of a Federal crime, hearsay would be sufficient to establish probable cause at a preliminary hearing, right, in Federal Court?

MR. ACKOUREY: I would agree.

THE COURT: So why doesn't it make more sense that we have a national standard rather than saying we are going to look to the law of the 50 states?

MR. ACKOUREY: Because I don't think we are in a position to

legislate, Judge. Let me explain to you what I mean. There's a case cited by the Government, and I may be killing this, it's Greiche v. Burkus, which is a Federal First Circuit case. It involved an Italian treaty and the application of an Italian extradition provision under the treaty within. And there, Article 5 of the treaty had provided -- and there's a long analysis of the history of its treaty and the language and its various amendments to that treaty, and there the treaty provided very similarly to what we face today in this case, that sufficiency would be determined by the law of the place where the person was sought.

In its analysis, the Court discussing the history says, Both delegations, both the United States delegation and the Italian delegation, aware that the Courts have applied State law, using that phrase, amended the Italian treaty, treaty within, to apply the law of the requested party. So the Italian treaty of extradition with the United States, which had language almost identical to what we face here, was conscientiously amended to provide that the law of the requested party would be applied in determining the sufficiency of the evidence, for the very reasons that we face in this case.

Here, Judge, with the treaty we face with Canada, there were two protocols that had been submitted to amending terms. And it's important to note, Judge, that, in amending the

Canadian treaty, as it applied to what crimes are going to be extraditable, the protocol, Article 2 would be first protocol, amended to include that we would compare the statutes of the contracting parties, and the term contracting parties was used clearly to delineate that we are talking about, we're going to look at the laws of Canada, we're going to look at the laws of the United States to determine if there are coordinate offenses. That language could have been used to amend Article 10, and it wasn't.

THE COURT: What about Article 8. Article 8 says that the determination that extradition should or should not be granted shall be made in accordance with the law of the requested state.

MR. ACKOUREY: That's correct. And I think what that means and I think what it has been interpreted to mean is that the issue of whether or not probable cause exists and a definition of probable cause and the applicability of probable cause is going to be best based upon the law of the requested state, but that's different than the evidentiary issue. The sufficiency of the evidence is specifically dealt with in Article 10.

As Sylvester notes, in Pennsylvania, Commonwealth v. Buchanan, which is the Pennsylvania State law, regarding admissibility of hearsay and establishment of probable cause, we are not talking, merely, about a procedural or evidentiary issue in Pennsylvania, we are talking about a substantive right

grounded in Pennsylvania Constitutional law.

THE COURT: That was a plurality opinion?

MR. ACKOUREY: It was, Judge. So, Your Honor, the point being that if we apply the plain language of Article 10, I don't know how one could interpret it, other than that the law of Pennsylvania applies, as Judge Jones has done, and apply Pennsylvania law requiring more than hearsay, the evidence submitted and the affidavits were simply insufficient.

We address this, and I'm not going to beat a dead horse, but even if one were to accept the evidence, as submitted, that it's insufficient to establish probable cause in this particular case, due to those factors which I have previously mentioned.

THE COURT: What about, did you look at Shapiro v. Fernandina, another case cited by the Government?

MR. ACKOUREY: I did, Judge.

THE COURT: Out of the Second Circuit, Judge Friendly wrote the opinion. There there was a New York statute that said, essentially, that a preliminary hearing and subject to exceptions not otherwise material, only non-hearsay evidence is admissible to demonstrate reasonable cause to believe that Defendant committed a felony, yet, Judge Friendly said, for extradition purposes, that statute has no application.

MR. ACKOUREY: But I think -- the difference, I think, the distinction here is that in Pennsylvania applying Pennsylvania

law, it's a substantive right, as opposed to a mere procedural right, and I think that's the distinction here. I think, procedurally, Federal law may apply and admissibility issues and the affidavits are admissible. But where there's a substantive right, due process right is recognized, and under Article 10 of the treaty, I think, Judge, that's the distinction to be drawn.

THE COURT: Let me hear from the Government.

MR. FISANICK: Yes, Your Honor, may it please the Court. The initial thing that my opponent has not mentioned here is what is the standard of review, and the standard of review for this Court is one of deference. It is not plenary, it is not de novo, it is not a re-weighing of the evidence adduced at the extradition hearing. So with that as the lynch pin of today's proceedings, the Government's argument is that this Court should deny the Writ of Habeas Corpus and give deference to Judge Mannion's finding that, indeed, there is probable cause in this case. I would like to point out --

THE COURT: I guess the question here is whether there's any evidence warranting the finding that there is reasonable ground to believe the accused's guilt.

MR. FISANICK: There is evidence, Your Honor.

THE COURT: Is that the standard you're relying on?

MR. FISANICK: Yes, probable cause is the standard, and that is not a high standard.

THE COURT: No, as I understand it, on the Habeas Corpus, on Habeas Corpus review, there are two --

MR. FISANICK: Yes.

THE COURT: -- three issues. One whether the Magistrate Judge had jurisdiction. There's no dispute the Magistrate Judge had jurisdiction.

Two, whether the offense charged is within the treaty. There's no dispute that the offense charged is within the treaty, correct, Mr. Ackourey?

MR. ACKOUREY: Correct.

THE COURT: And third, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty. Mr. Ackourey challenges that on two grounds: One, first, the evidence itself, looking at Article 10, hearsay would not be sufficient to establish probable cause in the Pennsylvania State Court prosecution at a preliminary hearing, so that all that was presented here was hearsay, so that, on that ground alone, extradition should be denied, and the second is, even the information that was provided, would not establish probable cause. Have I re-stated your arguments correctly?

MR. ACKOUREY: That's a fair restatement, Your Honor.

MR. FISANICK: That's correct, Your Honor. Again, it goes back to a deferential standard of review. A couple arguments have been made here why there's no probable cause, and I submit

to you that there is probable cause. First, the Defense seems to hang its hat on the fact that Judge Mannion, in his initial opinion, deciding that a summons was appropriate, had some dicta language suggesting that, perhaps, there wasn't enough evidence in the Government's filings. What was this case about? It looked like a horrific tragic accident. You'll note that in footnote 40 of Judge Mannion's opinion of March 4, 2009 ordering extradition, he explained the tension between the dicta, in his initial opinion, and the finding in this opinion.

The fact that he changed his mind, after he heard argument of Mrs. Harshbarger and the Government, does not, I would submit, make it ipso facto, that, oh, there is a dispute here, even in the mind of Magistrate Judge Mannion.

Also, the statement in his opinion of March 4, 2009 stating that the Government's affidavits, which might fairly construe, indicate that the Defendant's shot was neither grossly negligent or reckless is taken out of context by Ms. Harshbarger's counsel, because it continues;

"However, the burden at this stage is not proof beyond a reasonable doubt but rather merely probable cause. Such mitigating evidence does not wholly undermine the Government's showing, in regard to mens rea. At most, it lays the basis for a defense at trial."

Taken in context, that is Magistrate Judge Mannion's

opinion that the evidence is sufficient to show probable cause. The Defendant may have a good defense at trial in Canada when this case does come to trial.

The other argument made by the Defense, which was previously made before Magistrate Judge Mannion is this straw man argument that, well, she fired the shot with five minutes to spare because hunting was permitted thirty minutes after sunset in this Province of Canada. That's a straw man argument because, Your Honor, I submit you could be guilty under Canadian law, as well, you could be guilty under Pennsylvania law of firing a shot at high noon on a sunny day that was done in a grossly negligent or reckless manner to suffice for the mens rea for involuntary manslaughter.

So I think while it's not negligence, per se, based on the time the shot was fired, it's not exoneration, per se, or lack of probable cause, per se, simply because the shot was fired consistent with the law of the Province where the killing occurred.

Getting to the hearsay issue, and you will see by the Government's filing that we would maintain that Sylvester is incorrectly decided. You will note, Your Honor, that Sylvester was never appealed by the Government because the Government never got an appealable order.

THE COURT: It wasn't an appealable order, yes.

MR. FISANICK: Not an appealable order. And we would submit

you're not bound by Sylvester, because it's not precedent, clearly.

Here's why Sylvester doesn't really work for the Defendant. If Pennsylvania has a plurality case that says if you're tried of a crime in Pennsylvania, you have a procedural right to confront witnesses against you; in other words, a Pennsylvania preliminary hearing cannot be a paper hearing based solely on affidavits. Somebody has to testify. That is a procedural right. It is clear, under the United States Extradition Law here in Federal Court that extradition proceedings are expected to be paper hearings, because to hold otherwise would cause detectives from foreign countries to be brought, in this case, not very far, into the United States to testify, but it could be from parts around the world to testify to, basically, what's in affidavits. And conversely, United States detectives being compelled to testify in other parts of the world.

So comity demands an orderly procedure that is done on paper. Now, the fact that it's done on paper is not a bad thing because, clearly, as Your Honor has pointed out, the statute calls for under 3190 diplomatic process to certify these documents to make sure they're accurate. What happens is, these affidavits go before a United States Magistrate Judge, such as Magistrate Judge Mannion, who is an expert in determining what is probable cause and what is not. Because a United States Federal Magistrate Judge, as part of his duties, looks at

Government search warrants, Government arrest warrants, Government complaints, and determines probable cause based on paper affidavits.

Pennsylvania procedural law -- and I would strenuously argue this is not substantive law. The Defense here of Mrs. Harshbarger is that, well, it's a substantive right under Pennsylvania.

THE COURT: Well, in fact, there's a Pennsylvania statute that would allow use of hearsay evidence, for purposes of determining probable cause in child molestation cases, the context in which Buchanan was decided. It wasn't in existence when Buchanan was decided, but there have been subsequent Appellate Court decisions in Pennsylvania that have said that there's no problem with the confrontation clause in that statute.

MR. FISANICK: Actually, to be honest, Your Honor, the U.S. Supreme Court has never held that you have a right to confront witnesses at a preliminary hearing or formally preliminary examination, and I take that one step further. The Sixth Amendment right to confrontation does not apply to this proceeding in extradition, at all. So I find it curious that we would be even considering denying the extraditability of Mrs. Harshbarger, based on a parochial state case that grants a right of confrontation under Pennsylvania law, not Federal law, that would somehow supersede an entire body of U.S. Supreme

Court and Federal precedent which says;

Number one, you don't have a right to confrontation under the Sixth Amendment to the U.S. Constitution in an extradition hearing;

Number two, hearsay evidence is admissible;

Number three, it is expected that there would be no live witnesses under the extradition practice in the United States;

Number four, hearsay evidence alone can stand to form the basis of extraditability.

It all comes down to looking at what this procedure is, and this procedure is a Federal procedure that is very circumscribed and limited. In fact, until 3184 was adopted, I wouldn't be here arguing on behalf of the Government of Canada for extradition.

It sets forth in that section and the subsequent sections a orderly sui generous actually informal process which anticipates that if a foreign country such as Canada files a criminal complaint against Mrs. Harshbarger for a charge that looks like involuntary manslaughter under the laws of the United States in our Federal system, and they swear out affidavits and they swear out a criminal complaint and they swear out a warrant, and the Government of the United States and Canada get together through the diplomatic channels and present the appropriate paperwork to a United States Attorney's Office through my bosses in D.C. and a complaint is filed, and

the documents are introduced at a hearing and a United States Magistrate Judge reviews those documents, much as he would review affidavits for a search warrant and an arrest warrant for violation of the United States Code, and he reviews them and finds probable cause and orders extraditability of the Defendant, I would submit to you, Your Honor, that's all the process the Defendant is entitled to.

The Defendant is not entitled to a process that grafts on Federal Constitutional principles, such as, confrontation, exclusionary rule, right to exculpatory evidence, discovery, if it doesn't do that, it certainly doesn't graft upon the process of idiosyncratic Pennsylvania State Law Rule. So for those reasons, Your Honor, unless you have any questions, I would ask that this Court deny the Petition for Habeas Corpus and affirm Magistrate Judge's order of extraditability and commitment.

THE COURT: Mr. Ackourey, any rebuttal?

MR. ACKOUREY: Your Honor, the only point that I would bring out, again, is a fair reading of Buchanan indicates that the substantive rights that we are talking about are not only confrontational but due process rights as well, and I think that's brought out.

THE COURT: And you think it was the intention of the two sovereign governments, the Government of Canada and the Government of the United States, that the right to extradite would depend upon the laws of 50 different states?

MR. ACKOUREY: I do, Judge, and I say that, because, for instance, in analyzing the contracting parties' language, it's generally accepted that if there is not a corresponding Federal crime, we go to the law of the state where the wanted person is found.

THE COURT: But in this case there is a corresponding Federal case.

MR. ACKOUREY: There is, in this case, but my point is that, obviously, the parties there contemplated going beyond, merely, comparing United States Federal law to Canadian law, they anticipated that they would be going one step further to state law, if required. I think, in light of the fact that in other treaties that were mentioned, in the Greiche case, in particular, where the United States and Italy renegotiated the terms of what constitutes sufficient evidence. Removing the same language that we face today and replacing it with language, basically, saying why the law of the requested state would determine what's sufficient, I find it hard to believe that the United States and Canadian delegations in this particular instance were unaware of that and were unable to see that, in one instance, in the Italian treaty, there was a need for this, but that they were unaware when negotiating the protocols --

THE COURT: So you would think it would only be right, then, that we have a Canadian here -- we have somebody in -- we have

a crime that's been committed here in the United States and the person flees to Canada, that we've got to send our law enforcement officers up there, in order to establish probable cause?

MR. ACKOUREY: If the law of the Province where he is requires that. Now, what I'm saying, Judge, is, what I'm saying is that the statutory framework says we look to the language of the treaty. So your hypothetical where the person is at the Delaware Water Gap, if probable cause can be established through hearsay in the Federal process, there's no problem. If the law of California allows hearsay to establish probable cause, I mean, the person wanted is in California, no problem.

But here, in Pennsylvania, where we are going to apply the law at the place where the individual is found, if hearsay is not substantial evidence or competent evidence in this particular case, then, it's not acceptable. And I think that's exactly what Sylvester says.

THE COURT: But, again, if Mrs. Harshbarger had been accused -- had this occurrence happened in the Delaware Water Gap on Federal property and she had been accused of violating the Federal manslaughter statute, hearsay would be sufficient to hold her over for trial.

MR. ACKOUREY: Under the treaty, I believe you're correct.

THE COURT: All right, anything else?

MR. FISANICK: No, Your Honor.

THE COURT: All right. I'm going to recess for 15 minutes.

(At this time a recess was taken.)

THE COURT: All right, well, very interesting arguments have been presented, and some may say somewhat ingenious arguments, as well. I'm going to take the matter under advisement to study the matter a little more closely than the opportunity that I have had for the nine days that the case was in front of me.

The question I have, then, is the status of Mrs. Harshbarger pending my decision. She is scheduled to surrender on Friday of this week to the United States Marshals.

MR. FISANICK: Looking to me first, Your Honor, the United States would say that 3184 compels her to surrender, since a certificate of extraditability has been issued in this case.

MR. ACKOUREY: Judge, in response, I would point the Court to Judge Mannion's opinion where he cites Wright v. Hinkle, United States v. Williams for the proposition that bail extends to pre and post-extradition hearing phases. It indicates -- he indicates in footnote no. 6 that the treatise states that even after reaching a finding of extraditability, a Magistrate Judge may grant continued bail, and he cites Michael Abell, extradition to and from the United States. I would ask that the Court issue bail in this matter and allow her to remain on bail until such time as a determination is made with regard to the writ.

THE COURT: I understand the importance of these matters, in

terms of diplomatic relations, and I also understand, and I will take this into consideration in issuing my decision in this matter, that extradition is a two-way street, so we have to be concerned about making sure that we don't make extradition so cumbersome that it cannot be used by us when we need to use it for people that have committed crimes against the United States from outside our jurisdiction.

There is authority that does recognize the right to bail under these particular circumstances. They emphasize that bail should be granted with great circumspection, and they consider a couple factors.

One is the urgency of the matter. And by the urgency of the matter, they generally refer to the importance of the interests at stake. So, for example, in a terrorism case, the interest in making sure that the person is available would be substantial and would militate against bail. This is a prosecution for causing death by criminal negligence, it is not of that nature. They also say that there should be exceptional circumstances, and I view the fact that Mrs. Harshbarger has two young children to be an exceptional circumstance that warrants bail only for the period of time under which I have this matter under consideration.

I do want to look at it more carefully, in light of the arguments that have been made here today, so I'm not indicating that I would grant bail beyond the period of time it takes me

to decide this matter, and I don't intend to take much time to decide this matter, I want you to be aware of that. I had indicated that I may have ruled today from the bench, but I do want to write an opinion in this matter, and I think it would be better if I were to take my time to do that.

So having said that, I will find exceptional circumstances that do allow for bail, here. I do believe, and I found the decision from Judge Learned Hand when he was a District Judge that he imposed conditions on bail, and I would be inclined to impose conditions on bail. And, in particular, that I would require posting bail in the amount of $100,000 in this particular matter so as to assure that when it comes time for Mrs. Harshbarger to turn herself in, that there is some security for that eventuality happening.

I do note that it is commendable that she is present here in court. There has been no indication of an intention on her part to flee, but on the other hand, there would be substantial concerns on the part of the Canadian Government, so I think that by Friday of this week, she needs to post a bail bond or in the event that she does not, that she be subject to surrendering to the United States Marshals Office, all right.

MR. FISANICK: One more matter before we go, Your Honor. The Government would move to be excused from responding to the declaratory judgment and injunctive request under the filing by Ms. Harshbarger. We believe it was inappropriate and would

ultimately be subject to a Motion to Dismiss, but pending your decision on the habeas, we don't want to be placed in a position of my having to answer for Mr. Holder, Ms. Clinton and Ms. Torres and Mr. Regan.

THE COURT: Any objection, Paul?

MR. ACKOUREY: No.

THE COURT: There is no need to respond.

MR. ACKOUREY: Judge, what time would she need to report, in the event bail is not posted?

THE COURT: In the event bail is not posted, by 2 p.m. on Friday. All right.

MR. ACKOUREY: Thank you.

MR. FISANICK: Thank you, Your Honor.

(At this time the proceedings were adjourned.)

C E R T I F I C A T E

I, KRISTIN L. YEAGER, Official Court Reporter for the United States District Court for the Middle District of Pennsylvania, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a true and correct transcript of the within-mentioned proceedings had in the above-mentioned and numbered cause on the date or dates hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my supervision.

S/Kristin L. Yeager
KRISTIN L. YEAGER, RMR,CRR
Official Court Reporter

REPORTED BY:

KRISTIN L. YEAGER, RMR,CRR
Official Court Reporter
United States District Court
Middle District of Pennsylvania
P.O. Box 5
Scranton, Pennsylvania 18501

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